Supreme Court of the United States.

No. 50.—October Term, 1905.

Beryl F. Carroll, Auditor of State of the State of Iowa, Appellant,
vs.
The Greenwich Insurance Company of New York et al.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

[November 27, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill brought by a number of fire insurance companies, incorporated in States other than Iowa, to enjoin the auditor of that State from enforcing §§ 1754, 1755 and 1756 of the Iowa Code, 1897. The ground of the bill is that these sections are invalid under the State Constitution and the Fourteenth Amendment of the Constitution of the United States. There is a reference also to Article 1, Section 10, and an oblique suggestion that the law impairs the obligation of contracts. The defendant demurred, and the Circuit Court issued an injunction as prayed, which was made perpetual by final decree. 125 Fed. Rep. 121. Thereupon the defendant appealed to this Court.

By section 1754, "It shall be unlawful for two or more fire insurance companies doing business in this State, or for the officers, agents or employes of such companies, to make or enter into any combination or agreement relating to the rates to be charged for insurance, the amount of commissions to be allowed agents for procuring the same, or the manner of transacting the fire insurance business within this State; and any such company, officer, agent or employe violating this provision shall be guilty of a misdemeanor," and a fine is imposed for each offense. By § 1755 it is made the duty of the auditor of state to summon for examination, under oath, any officer, agent or employe suspected of violating § 1754, and if he determines that the company is guilty, or if the officer or agent fails to appear, to revoke the authority of the company to do business in the State for one year. By § 1756 an appeal is given from the decision of the auditor to the district court, the case to be tried *de novo*, as equitable causes are tried. By § 1757 the statements made upon the examination before the auditor or county court shall not be used in any criminal prosecution against the person making them.

The bill sets forth the necessity for every insurance company to gather all the experience available into one mass and to analyze and classify it scientifi-

cally in order to ascertain the true value of risks, and that it will add greatly to the expense if each company is required to employ a separate person to do the work. It charges, upon information and belief, that if the plaintiffs attempt to combine their experience and to employ the same person to analyze it, the auditor will summon them and revoke their authority to do business in the State. It further alleges that the plaintiffs desire not only to do what has been stated for their guidance in establishing rates, but to agree what classes of risks are non-insurable, how various risks shall be classified, and as to other matters relating to the manner of doing business. It repeats the charge, upon information and belief, that if the plaintiffs proceed in this manner the auditor will order an examination and revoke their licenses, and prays for an injunction against enforcing in any manner the above-mentioned sections of the Iowa Code. The Circuit Court considered that the statute was not invalid under the Constitution of Iowa, but held that the prohibitions of agreements as to the amount of commissions to be allowed, or as to the manner of transacting the fire insurance business in the State, were contrary to the Fourteenth Amendment. While waiving a discussion of the clause against combinations as to rates, it seemingly regarded the provisions of § 1754 as inseparable, and issued a general injunction forbidding the enforcement against the plaintiffs of §§ 1754, 1755 and 1756.

We assume, for purposes of decision, that the bill means that the auditor threatens and intends to enforce the act in case the plaintiffs do what they desire to do, and that if § 1754 is contrary to the Constitution of the United States, a proper case for an injunction is made out. *Osborn* v. *Bank of the United States*, 9 Wheaton, 738, 839, 840. See *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517, 531; *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 378. We assume further that the position of the plaintiffs is not affected by the fact that they are foreign corporations. The act is in general terms, and hits all insurance companies. If it is invalid as to some, it is invalid as to all. *United States* v. *Ju Toy*, 198 U. S. 253, 262, 263. That the requirements of the act might have been made conditions to foreign companies' doing business in the State, *Fidelity Life Ins. Co.* v. *Mettler*, 185 U. S. 308, *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, is immaterial, since, as we understand the statute, the legislature did not attempt to reach the result in that way. A company lawfully doing business in the State is no more bound by a general unconstitutional enactment than a citizen of the State. *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452.

We pass to the question upon which the Circuit Court decided the case, namely, the constitutionality of § 1754, the only section which we find it necessary to consider. Whatever may be thought of the policy of such attempts, it cannot be denied in this Court, unless some of its decisions are

to be overruled, that statutes prohibiting combinations between possible rivals in trade may be constitutional. The decisions concern not only statutes of the United States, *Northern Securities Co.* v. *United States*, 193 U. S. 197, *Swift* v. *United States*, 196 U. S. 375, but also State laws of similar import. *Smiley* v. *Kansas*, 196 U. S. 447. *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115.

In view of these cases further discussion is unnecessary, but we will add a few words. While we need not affirm that in no instance could a distinction be taken, ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a State law in like terms was void under the Fourteenth. It is true that by the provision in the body of the instrument Congress has power to regulate commerce, and that the act of Congress referred to in the cases cited was passed in pursuance of that power. But even if the Fifth Amendment were read as contemporaneous with the original Constitution, the power given in the commerce clause would not be taken to override it so far as the Fifth Amendment protects fundamental personal rights. It is only on the ground that the right to combine at will is a fundamental personal right that it can be held to be protected by the Fourteenth Amendment from any abridgment by the States. *Cincinnati Street Ry. Co.* v. *Snell*, 193 U. S. 30, 36. Many State laws which limit the freedom of contract have been sustained by this Court, and therefore an objection to this law on the general ground that it limits that freedom cannot be upheld. There is no greater sanctity in the right to combine than in the right to make other contracts. Indeed, Mr. Dicey, in his recent work on Law and Public Opinion in England during the Nineteenth Century, indicates that it is out of the very right to make what contracts one chooses, so strenuously advocated by Bentham, that combinations have arisen which restrict the very freedom that Bentham sought to attain, and which even might menace the authority of the State. If then the statute before us is to be overthrown more special reasons must be assigned.

At the argument before us more special reasons were assigned. It was pressed that there is no justification for the particular selection of fire insurance companies for the prohibitions discussed. With regard to this it should be observed, as is noticed by the appellees, that a general statute of Iowa prohibits all contracts or combinations to fix the price of any article of merchandise or commodity, or to limit the quantity of the same produced or sold in the State, Code of 1897, § 5060, and that this section covers fire insurance. *Beechley* v. *Mulville*, 102 Iowa, 602. Therefore the act in question does little if anything more than apply and work out the policy of the general law in a particular case. Again, if an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that

they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation. *Otis* v. *Parker*, 187 U. S. 606, 610, 611. And if this is true, then in view of the possible teachings to be drawn from a practical knowledge of the business concerned, it is proper that Courts should be very cautious in condemning what legislatures have approved.

If the legislature of the State of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this Court cannot say that fire insurance may not present so conspicuous an example of what that legislature thinks an evil as to justify special treatment. The imposition of a more specific liability upon life and health insurance companies was held valid in *Fidelity Mutual Life Insurance Co.* v. *Mettler*, 185 U. S. 308. See also *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557. *Otis* v. *Parker*, 187 U. S. 606. *Home Life Insurance Co.* v. *Fisher*, 188 U. S. 726, 727.

But it is said that, however it may be as to some regulations of fire insurance, these, or at least the last two of them, forbidding agreements as to agents' commissions and the manner of transacting business, are not to be justified. In order to make this out the scope of the provisions was exaggerated both in the argument and in the bill. The bill seems to assume that the statute forbids insurance companies to obtain and use each other's experience, or to employ the same person to work up the results. It does not. It simply forbids an agreement between the companies relating to the rates which may be based upon those results. No doubt an agreement between the companies readily would be inferred, if they were found all to charge the same rates; but an agreement between the companies is the only thing aimed at, and if they avoid that they escape the law. So it was suggested in argument that they could not employ the same adjuster in case of loss. We do not perceive anything to hinder their doing so, although it may be that they would have to be careful about the terms of his authority. The object of the law, we assume, until the Iowa Court shall decide otherwise, is single, to keep up competition, and the general language is to be restricted by the specific provisions and to the particular end. Limited as we understand it to be limited, the statute goes no further than others which have been sustained, and does not contravene the Constitution of the United States.

The argument before us very properly was rested on the Fourteenth Amendment. Therefore it is unnecessary to discuss the other objections suggested in the bill.

Although we have conceded that the bill makes a case for an injunction if its premises are true, it cannot be understood to charge that the auditor

will go further than to enforce the act as properly construed. The allegations upon information and belief, which we have stated, probably mean no more than that the plaintiffs reasonably suppose that the auditor will do his duty. They are pressed to the verge when they are taken to set forth a threat to do that. They certainly do not show that he threatens to do more.

Decree reversed.

True copy.

Test:

Clerk Supreme Court, U. S.

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[November 27th 1905.]

Mr. Justice Harlan, concurring.

It is clear from the averments of the bill that the insurance companies had not, prior to the institution of this suit, made any combination or agreement, among themselves, relating to the rates to be charged for insurance or to the amount of commissions to be allowed agents for procuring insurance or to the manner of transacting fire insurance business within the State. They expressed a desire to make such a combination or agreement, but were apprehensive that by doing so they would come into conflict with the State authorities. The Auditor had done nothing under the statute and will have nothing to do in execution of its provisions, unless the insurance companies enter into the forbidden combination or agreement. Nevertheless, the plaintiffs came into court, avowed that they had not as yet violated the statute, but asked to be informed whether, in the event they concluded to do so, their officers, agents or employes could be legally summoned before the State Auditor for examination, as prescribed in section 1755. In other words, in advance of anything being done in violation of the statute or of any steps being taken by the Auditor in execution of its provisions, the opinion of the court was asked and obtained as to its constitutionality. This is a very convenient—and, in my judgment, a mischievous—mode of obtaining the opinion of a court upon an abstract question of the constitutionalty of a statute which has not been and may never be violated, and under which no case may ever arise calling for judicial interference. It is as if the plaintiffs had addressed a personal communication to the court asking to be informed as to what they might safely to. It seems to me that the suit has been prematurely brought. If the plaintiffs should make such a combination as is forbidden by the statute, the time to seek judicial interference in their behalf would be when the State Auditor proceeds or in some definite way indicates his purpose to proceed under section 1755. I think the decree below should be re-

versed and the bill ordered to be dismissed, upon the ground that no facts existed, at the time the suit was brought, to justify a judicial tribunal in delivering a judgment as to the constitutionality of the State statute.

As, however, the court considered the case upon the merits, it is appropriate to say that I concur with the court in holding that the section of the statute which is assailed is not invalid. The business of fire insurance is of such a peculiar character, so intimately connected with the prosperity of the whole community, and so vital to the security of property owners, that it is competent for the State to forbid combinations and agreements among fire insurance companies doing business within its limits, in reference to rates, agents' commissions and the manner of transacting their business. If, in the judgment of the State, the people who desire insurance upon their property are put at a disadvantage when confronted by a combination or agreement among insurance companies, I do not perceive any sound reason why, preserving the individual right of contracting, it may not forbid such combinations and agreements, and thereby enable the insured and insurer to meet on terms of equality. Surely, the State could enact such a regulation with reference to companies organized under its own laws. If that be so, it cannot be that such a regulation may not be made applicable to foreign insurance companies doing business in the State only by its consent.

True copy.

Test:

Clerk Supreme Court, U. S.